STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 8, 2008
v	No. 272728 Oakland Circuit Court
STEVEN LESLIE BOYT, Defendant-Appellant.	LC No. 2006-206293-FH

Before: Saad, P. J., and Owens and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of aggravated stalking, MCL 750.411i(2)(d). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to a prison term of 18 months to 15 years. We affirm.

I. Basic Facts and Proceedings

Defendant and the victim lived in neighboring duplexes in Lake Orion. The victim testified that she was kind to defendant because she knew he had medical problems and did not own a vehicle. She gave him her home telephone and cellular telephone numbers and occasionally provided him with transportation over the course of several months in 2005. Defendant and the victim engaged in friendly social visits and even attended a wedding together. Defendant began showing up at the victim's home at various hours of the evening and early morning when he was intoxicated. The victim objected, and she stopped answering her door. The victim repeatedly requested that defendant stop calling her, stop coming over to her home, and leave her alone. Defendant continued to come over to the victim's home, and on July 4, 2005, he pounded on her door and broke a window. Some time after that incident, the victim called the police for the first time.

Defendant was arrested and jailed, but he continued to call the victim from jail. The victim accepted one telephone call from jail, and she admitted that she "said a lot of things that [defendant] wanted to hear[,]" including that she missed him and would not show up for court. However, at the end of the call, the victim told defendant that she had been left with no choice but to call the police because he would not listen to her and stop coming to her home. Although the victim did not answer any more calls, defendant continued to call from jail throughout August, September, and October, until the victim placed on a block on calls from the jail. During defendant's incarceration, approximately 270 telephone calls were placed to the victim's

telephone number from jail cells where defendant was housed. Following a bench trial, defendant was convicted of misdemeanor stalking, MCL 750.411h, on October 10, 2005, and he was sentenced to 90 days in jail. After his release from jail on October 25, 2005, defendant began calling the victim again, sometimes as often as every 10 minutes, and often leaving messages on the victim's answering machine. The victim again reported his conduct to the police.

Defendant was arrested again—on the current charge—on December 9, 2005 and charged with aggravated stalking for conduct occurring between July 24, 2005 and trial, which occurred on May 25 and 26, 2006. Defendant was convicted as charged, and this appeal follows.

II. Double Jeopardy

Defendant argues that his prosecution for aggravated stalking violated his double jeopardy protections because he was convicted on the basis of the same conduct that led to his misdemeanor stalking conviction. We disagree. Double jeopardy issues are reviewed de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

The double jeopardy protections, US Const, Am V; Const 1963, art 1, § 15, protect against "a second prosecution for the same offense after acquittal[,]" "a second prosecution for the same offense after conviction[,]" and "multiple punishments for the same offense." *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). As defendant correctly observes, both the misdemeanor and aggravated stalking statutes define stalking as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411h(1)(d); MCL 750.411i(1)(e). The stalking charge in this case was "aggravated" by defendant's previous misdemeanor conviction involving the same victim, MCL 750.411i(2)(d), resulting in some overlap in the evidence presented at defendant's two trials. Contrary to what defendant argues, however, defendant was not convicted for the same conduct in both cases. Rather, the misdemeanor charge was based on an offense occurring on July 23, 2005, and the felony charge was based on conduct occurring from July 24, 2005 until trial, which occurred on May 25 and 26, 2006. Because the convictions arose out of "two distinct occurrences or episodes," defendant's aggravated stalking conviction does not violate double jeopardy principles. *People v White*, 212 Mich App 298, 305-306; 536 NW2d 876 (1995). See also *People v Lugo*, 214 Mich App 699, 708-709; 542 NW2d 921 (1995) (there is no violation of double jeopardy protections if one offense is completed before the other begins).

Because we find no double jeopardy violation, we also reject defendant's argument that defense counsel was ineffective for failing to move for dismissal on this basis. Counsel is not required to make futile motions. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

III. Defendant's Standard 4 Brief

A. Sufficiency of the Evidence

Defendant contends that he was improperly convicted of aggravated stalking because the evidence failed to show that his conduct actually caused the victim to suffer emotional distress, and further, he did not have a prior stalking conviction at the time of the alleged conduct. We disagree. When the sufficiency of the evidence is challenged, we review the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). The standard of review is deferential, and this Court is required to draw all reasonable inferences and make credibility choices in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Aggravated stalking consists of the crime of stalking and one of the aggravating circumstances described in MCL 750.411i(2). *People v Threatt*, 254 Mich App 504, 505; 657 NW2d 819 (2002). Stalking is defined as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411i(1)(e). Harassment is "conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress." MCL 750.411i(1)(d). Emotional distress is defined as "significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." MCL 750.411i(1)(c). Evidence that a "defendant continued to engage in a course of conduct" after being asked to discontinue such conduct and refrain from unconsented contact, creates a rebuttable presumption that "the continuation of the course of conduct caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411i(5). Aggravating circumstances include a violation of a restraining order or injunction, a violation of probation, parole, pretrial release, or bond, the making of threats against the victim or his family, and a previous conviction pursuant to MCL 750.411h.

In this case, the victim testified that defendant continued to pound on her door and telephone her at all hours of the day and night after she complained and told him to stop, and that she filed police reports against him. She explained that she was worried, petrified, and scared because she did not know if he would come to her home and did not "know what he [was] capable [of]." The police officer who took her complaint testified that she was sobbing and fighting back tears. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find that the victim suffered the requisite emotional distress.

Defendant argues that there was insufficient evidence of a previous conviction under MCL 750.411h. At the outset, we note that defendant's argument is misplaced because it is based on the definition of a prior misdemeanor conviction, as used in scoring prior record variable five, MCL 777.55, for sentencing purposes. Regardless, defense counsel stipulated the prior misdemeanor stalking conviction, and the evidence at trial established that defendant continued his course of conduct against the victim after he was convicted of misdemeanor stalking, thereby properly subjecting defendant to conviction for aggravated stalking. MCL 750.411i(2)(d). After reviewing the evidence in a light most favorable to the prosecutor, we

conclude that a trier of fact could find that the essential elements of aggravated stalking were proven beyond a reasonable doubt.

B. Vagueness Challenge to MCL 750.411i

Defendant claims that the aggravated stalking statute is unconstitutionally vague because it fails to provide notice of the conduct proscribed. We disagree. Because defendant failed to preserve this issue by raising it before the trial court, it is unpreserved and may only be reviewed for plain error. *People v Osantowski*, 274 Mich App 593, 600; 736 NW2d 289 (2007).

This Court has, on several occasions, held that MCL 750.411i is not unconstitutionally vague and provides fair notice of the proscribed conduct. *People v Coones*, 216 Mich App 721, 728; 550 NW2d 600 (1996); *People v Ballantyne*, 212 Mich App 628, 628-629; 538 NW2d 106 (1995); *White, supra* at 309-313. Therefore, reversal is not warranted on this ground.

C. Ineffective Assistance of Counsel

Defendant argues that he should be permitted to establish an evidentiary record to show that trial counsel was ineffective for failing to obtain a record of telephone calls from a Kroger pay phone and surveillance tapes of the Kroger store pay phone, and for also failing to obtain his cellular telephone records and his brother's home and cellular telephone records.

1. Telephone Records

If a defendant's ineffective assistance of counsel claim is not factually supported by the record, the defendant must first move in the trial court for an evidentiary hearing to establish factual support for his claims. *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973). Defendant did not file such a motion in this case, but this Court may grant a motion to remand for this purpose if the defendant files an affidavit or offer of proof regarding the facts to be established on remand. MCR 7.211(C)(1)(a)(ii). In determining whether to grant a motion to remand, this Court considers whether defendant has "set forth any additional facts that would require development of a record to determine if defense counsel was ineffective." *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007).

In support of his request for a remand on this issue, defendant has submitted an affidavit in which he avers that he asked trial counsel to obtain the requested evidence. However, defendant has not shown any factual support for his belief that the Kroger telephone records and surveillance tape actually exist. The evidence at trial indicated that the Kroger pay phone did not generate records, a store cashier testified that she was not aware of any surveillance camera in the area of the lobby pay phone, and an investigating police officer testified that there was no visible camera in that area. Without an offer of proof or evidence factually supporting defendant's claim that the requested Kroger records actually exist, remand on this issue is not warranted.

Defendant has not shown that the requested telephone records for defendant's cellular telephone and his brother's telephones would have sustained his ineffective assistance of counsel claim. Defendant made approximately 270 telephone calls to the victim's home from his jail cell, a witness observed defendant using the Kroger pay phone at the time a call was made to the

victim's home, and numerous answering machine messages from defendant were played for the jury. Because there is no basis for believing that the requested telephone records would establish a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, remand for an evidentiary hearing on this issue is not warranted. See *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

2. Trial Strategy

Defendant also asserts that trial counsel employed incompetent trial strategy by admitting to the jury during his opening statement that defendant made numerous telephone calls to the victim. Defendant argues that counsel essentially conceded his guilt. We disagree. The prosecution presented evidence that approximately 270 telephone calls to the victim were placed from jail cells where defendant was housed. One of those calls resulted in a recorded conversation with the victim in which the victim remarked that she missed defendant and never told him to stop calling. Given this overwhelming evidence, it was not unreasonable for trial counsel to concede that phone calls were made and to argue instead that, in the context of the relationship between defendant and the victim, the calls did not cause the victim emotional distress. Defendant has not overcome the presumption of sound trial strategy. The fact that counsel's strategy was unsuccessful does not constitute ineffective assistance. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

We also disagree with defendant's claim that counsel was ineffective for successfully moving to strike a jury instruction that would have informed the jury that evidence that defendant continued to engage in a course of conduct after being told to stop would give rise to a rebuttable presumption that the victim suffered emotional distress. MCL 750.411i(5). As defendant points out on appeal, in *White, supra* at 314, this Court held that such an instruction is mandated. However, defendant fails to explain how he was prejudiced by the absence of the instruction. If anything, the omission worked to defendant's benefit. Because defendant has not established that he was prejudiced by the absence of the instruction, he has not shown that counsel was ineffective.

D. Defendant's Prior Misdemeanor Conviction

Defendant contends that his aggravated stalking conviction must be vacated because there was insufficient evidence to support his previous misdemeanor stalking conviction, and because of other defects associated with that misdemeanor conviction. The instant appeal is limited to defendant's aggravated stalking case, and this Court lacks jurisdiction to decide any claims relating to the prior misdemeanor conviction case. *People v Anderson*, 209 Mich App 527, 538; 531 NW2d 780 (1995). Therefore, we decline to consider this issue.

Affirmed.

/s/ Henry William Saad
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly